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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ARMANDO NAVAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether defendant's voice identification was so suggestive as to violate due process when it was made by one witness who had no special training in making a voice identification and the manner that the identification was made was suggestive.

2. Whether counsel rendered ineffective assistance of counsel by failure to submit an instruction relative to voice identification similar to that found to be required in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), for eyewitness evidence.

3. Whether defendant's right of confrontation was denied when there was limitation of cross-examination of crucial witness as to bias and interest.

4. Whether introduction of details of how the government obtains permission to review phone interceptions prejudiced defendant because it inherently advised the jury that a judge had agreed with the prosecutor's assertion and thereby implicitly vouched for the credibility of the government witness and whether this procedure permitted introduction of substantial hearsay in violation of the Sixth Amendment to the United States Constitution.

5. Whether defendant's right to effective assistance of counsel and due process was denied when counsel failed to request and the court failed to give crucial instructions as to interest and bias at the time of the testimony of Herrera and Tmiri.

6. Whether defendant was denied his constitutional right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and due process under the Fifth Amendment to the United States Constitution where defense counsel in opening statement advised the jury that the government's case was so weak that the defense was not even requiring the government to prove defendant guilty beyond a reasonable doubt and that defense counsel will prove defendant innocent.

PARTIES INVOLVED

Petitioner, Armando Navar, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, and appellee in the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Armando Navar, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment (conviction and sentence) of the United States District Court for the Northern District of Illinois, adjudging defendant guilty of conspiracy to distribute cocaine, distribution of over five kilograms of cocaine and use of a communication facility during a felony, and sentencing him as follows:

> "Judgment (Sentencing Order) as to Armando Navar (14), Count(s) 1, 3, 5, 8, 12, it is the judgment of this court that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 324 months concurrently on each of counts one and eight. As to count Three, Five and Twelve, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 48 months. Said sentence on Counts 1, 3, 5, 8 and 12, to run concurrently with each other. Upon release from imprisonment, the defendant is sentenced on all count(s) of conviction, namely, Count(s) 1, 3, 5, 8, and 12 to a period of 5 years

of supervised release, said periods to run concurrent. Criminal monetary penalties. Amended Preliminary Order of Forfeiture. The defendant is immediately remanded to the custody of the United States Marshal. Count(s) 1, 12, 3, 5, 8, remaining counts are dismissed on the motion of the United States."

JUDGMENT AND OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit dated March 3, 2009 is set out as App. A.

JURISDICTIONAL STATEMENT

Jurisdiction in the United States Court of Appeals for the Seventh Circuit was based on 28 U.S.C. Section 1291.

The Opinion of the United States Court of Appeals for the Seventh Circuit was decided on March 3, 2009 (Nos. 06-1754, 06-2380 and 06-2821) and is thirty-six pages in length.

The Petition for Writ of Certiorari was due on June 2, 2009.

The reason the Petition for Writ of Certiorari was not timely filed is because of the illness of counsel which caused him to remain in the hospital until June 4, 2009, two days after the Petition for Writ of Certiorari was due on June 2, 2009. The history of counsel's illness is as follows:

On January 1, 2009, counsel had a heart attack and was admitted to St. Francis Hospital in Evanston, Illinois. On January 5, 2009, counsel had surgery for his heart attack. On January 9, 2009, counsel was released from the hospital, but was ordered by his doctor to remain at home for at least six weeks. On January 13, 2009, counsel was readmitted to the hospital suffering from pneumonia (Legionnaire's Disease) and placed in the Intensive Care Unit. On January 19, 2009, counsel was transferred from the Intensive Care

Unit to a room in the Cardiac Care Unit. On January 22, 2009, counsel was transferred to a rehabilitation center. On January 31, 2009, counsel was released from the rehabilitation center, but was ordered by his doctor to remain at home. On March 26, 2009, counsel was readmitted to Evanston Hospital (NorthShore University HealthSystem) for evaluation of an infection in his right leg which doctors believed could lead to osteomyelitis. On April 24, 2009, counsel was transferred from the hospital to Ballard Healthcare, Des Plaines, Illinois, a physical therapy facility. On May 27, 2009, counsel was transferred from Ballard Healthcare to the physical therapy facility at Evanston Hospital (NorthShore University HealthSystem). On June 4, 2009, counsel was released from the physical therapy facility at Evanston Hospital (NorthShore University HealthSystem). Counsel has worked a few hours per day in his office since June 17, 2009.

The delay in timely filing the Petition for Writ of Certiorari was caused by counsel's illness described above and his prior illness of a mini-stroke in August, 2008. These medical reasons qualify as exceptional circumstances under Rule 13(5).

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> "No person shall ... be deprived of ... liberty ... without due process of law."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

During opening argument, defense counsel argued:

> "Members of the jury, Mr. Hyman and I, Larry and I, intend to prove to you -- that's right, we who have no burden, it's true. As you heard my adversary say, Ms. Noller and his Honor will tell you again, instruct you later, that the government, that the government has the burden of proof beyond a reasonable doubt in every criminal case. But in this case, members of the jury, I will respectfully tell you now that we appreciate those advantages, but we don't want those advantages. He is presumed innocent, that's true, but we don't want any advantage at all because we will confidently prove to you at the end of this case, by the end of this case that Armando Navar is an innocent person and being set up and being framed by a person who has an absolute visceral hate for Armando Navar...." (Tr. 16-18)

> "I will competently prove -- we will competently prove to you that Armando Navar is not a drug dealer." (Tr. 20)

DEA Agent Tulshi, an agent with four years experience (Tr. 115), was involved with the arrest of defendant, Armando Navar. (Tr. 118) Prior to the arrest, he listened to a Title 3 tape (Tape No. 331),

a six minute call that involved two people. One person he knew to be Jesus Herrera. Prior to the arrest of defendant, he could not identify the other person.

He was involved in the arrest of defendant.

There was also a post-arrest interview at the officer's office. (Tr. 123-124) They were not extensive.

He had no special training in voice identification. (Tr. 126) He never recorded the conversation with defendant on the date of defendant's arrest. Hence, he could compare the voices on the tape to a tape of the voice heard on the day of defendant's arrest. (Tr. 128) He could not play one tape and then play another. He could not compare one voice on to another voice on tape.

He was attempting to determine if defendant was the person on the recording. He did so by comparing that voice to his recollection of defendant's voice with no other voice available for comparison.

Ahmed Tmiri testified he worked for Jesus Herrera in delivering drugs (Tr. 477) and in the furniture business; that in the store he saw a person named Doctor. (Tr. 480) He was asked if he saw the Doctor in the courtroom and he said no. (Tr. 480) Defendant was in the courtroom at

counsel table with co-defendant, Marco Thomas.

The prosecutor then had the witness testify he was having problems seeing because he did not have his glasses. (Tr. 484) The witness was then permitted to walk from the witness chair around the courtroom (Tr. 508-509) and then identified defendant and co-defendant, Marco Thomas.

A crucial government witness was Jesus Herrera. He was a main member of the drug conspiracy charged in the indictment in the instant case. He pled guilty and faced the possibility of substantial incarceration.

The intent of defendant's cross-examination was to demonstrate the bias and interest of the witness by demonstrating that to avoid such a long sentence the witness would testify on behalf of the government against defendant to satisfy what the government wanted to hear. (Tr. 300) The witness stated he could obtain a reduced sentence if he was truthful.

The defense then wanted to demonstrate the test of what is truthful in reality to satisfy the government who then would request from the court a reduced sentence.

Counsel for defendant tried to demonstrate that truth in this context is subjective--what the government believes. Defendant's counsel was

prevented from presenting this to the jury.

Over objection the court permitted the jury to be presented substantial evidence concerning how the government obtained permission to tape phones. (Tr. 28-34) The testimony advised the jury that a judge finds probable cause to believe "that the phone is being used to conduct drug trafficking crimes." (Tr. 28-29)

Witness Herrera and witness Ahmed Tmiri were co-defendants, alleged accomplices, who had admitted guilt and pled guilty.

As to each in the final instructions, while the jury was instructed as to interest and bias of witnesses who received benefits, no such instruction was given at the time the witnesses testified.

No instruction was given to the jury on how to evaluate voice identification.

RAISING THE FEDERAL QUESTION BELOW

The issues raised here were raised in the trial court and on appeal to the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING CERTIORARI

1.

Defendant's voice identification was so suggestive as to violate due process when it was made by one witness who had no special training in making a voice identification and the manner that the identification was made was suggestive.

DEA Agent Tulshi, an agent with four years experience (Tr. 115), was involved with the arrest of defendant, Armando Navar. (Tr. 118) Prior to the arrest, he listened to a Title 3 tape (Tape No. 331), a six minute call that involved two people. One person he knew to be Jesus Herrera. Prior to the arrest of defendant, he could not identify the other person, later identified as defendant.

He was involved in the arrest of defendant.

There was also a post-arrest interview at the officer's office. (Tr. 123-124) They were not extensive.

The agent had no special training in voice identification. (Tr. 126) He never recorded the conversation with defendant on the date of defendant's arrest. Hence, he could compare the voices on the tape to a tape of the voice heard on the day of defendant's arrest. (Tr. 128) He could not

play one tape and then play another. He could not compare one voice on to another voice on tape.

He was attempting to determine if defendant was the person on the recording. He did so by comparing that voice to his recollection of defendant's voice with no one else available for comparison. This was the equivalent of an unnecessarily suggestive eyewitness identification procedure.

It is the equivalent of a witness to a crime being presented with only one person for him to view. This is suggestive. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); United States v. Wade, 388 U.S. 218, 232-233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). It is even more suggestive because the agent knew defendant was arrested as being part of the conspiracy. This is analogous to the witness seeing a defendant handcuffed by the police. People v. Lee, 44 Ill.2d 161, 254 N.E.2d 469 (1969); People v. Sanders, 4 Ill.App.3d 494, 280 N.E.2d 269 (2d Dist. 1972).

Such voice identification procedure is both unreliable and violates due process.

The general rules that apply to eyewitness identification should control with voice identification, but even more so. As to facial

identification, there is the face of the person that lingers in the mind of the witness, a face that includes special characteristics. There is the color of complexion, the placement of eyes, size of nose, size of ears and placement, hair color and arrangement.

There are no such specific characteristics of voice that assist in making an identification.

One-on-one voice identifications are almost inherently suggestive. Yeatman v. Inland Property Management, Inc., 845 F.Supp. 625, 628 (N.D. Ill. 1994); State v. Johnson, 351 A.2d 787 (N.J. Sup. Ct. App. Div. 1976), Macias v. State, 673 So.2d 176; Commonwealth v. Marini, 378 N.E.2d 51 (Mass. 1978); Jackson v. State, 594 So.2d 1298 (Ala. Crim. App. 1991).

The procedure of voice identification made by a person who has no expertise in voice comparison, who had minimal opportunity to compare voices, and a suggestive means to compare voices was made violates due process.

2.

Counsel rendered ineffective assistance of counsel by failure to submit an instruction relative to voice identification similar to that found to be required in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), for eyewitness evidence.

Where eyewitness identification is involved, courts hold there should be a jury instruction advising the jury as to how to evaluate the identification testimony. The leading case is United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Telfaire set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. The Telfaire type instruction has been adopted by the Sixth Circuit, United States v. Scott, 578 F.2d 1186, 1191 (6th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 201, 58 L.Ed.2d 182 (1978), as well as the Eighth, Seventh, and Fourth Circuits, United States v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), cert. denied, 424 U.S. 923, 96 S.Ct. 1133, 47 L.Ed.2d 332 (1976); United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975); United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974). A similar instruction was adopted by the Third Circuit before

Telfaire. United States v. Barber, 442 F.2d 517, 528 (3d Cir. 1971).

A similar type of instruction should be given when the issue is voice identification.

Without such instruction, the jury is unguided on this crucial issue. This violates due process.

Counsel rendered ineffective assistance of counsel because he failed to request such a crucial instruction. Everett v. Beard, 290 F.3d 500 (3d Cir. 2002).

3.

Defendant's right of confrontation was denied when there was limitation of cross-examination of crucial witness as to bias and interest.

A crucial government witness was Jesus Herrera. He was a main member of the drug conspiracy charged in the indictment in the instant case. He pled guilty and faced the possibility of substantial incarceration.

The intent of defendant's cross-examination was to demonstrate the bias and interest of the witness by demonstrating that to avoid such a long sentence the witness would testify on behalf of the government against defendant to satisfy what the government wanted to hear. (Tr. 300) The witness stated he could obtain a reduced sentence if he was truthful.

The defense attempted to show that it was up to the prosecutor to decide if he was truthful. The court denied cross-examination by defense counsel to so demonstrate.

The limitation destroyed defense from conveying to the jury the crucial bias and interest of the witness. This was a violation of defendant's right of confrontation. Davis v. Alaska, 415 U.S. 308; United States v. Manske, 186 F.3d 770 (7th Cir. 1999).

4.

Introduction of details of how the government obtains permission to review phone interceptions prejudiced defendant because it inherently advised the jury that a judge had agreed with the prosecutor's assertion and thereby implicitly vouched for the credibility of the government witness. This procedure permitted introduction of substantial hearsay in violation of the Sixth Amendment to the United States Constitution.

Over objection the court permitted the jury to be presented substantial evidence concerning how the government obtained permission to tape phones. (Tr. 28-34) The testimony advised the jury that a judge finds probable cause to believe "that the phone is being used to conduct drug trafficking crimes." (Tr. 28-29)

This is very prejudicial. United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006). It advises the jury as to the general accuracy of the charges against the defendants. It permits the testimony of the government witness to be strengthened by judicial findings. This is very prejudicial, especially here where the witnesses against defendant were drug dealers with reason to lie and whose testimony had to be considered with caution. See Federal Jury Practice and Instructions, Fifth Edition, Section 15.04, pp. 394-407.

5.

Defendant's right to effective assistance of counsel and due process was denied when counsel failed to request and the court failed to give crucial instructions as to the interest and bias at the time of the testimony of Herrera and Tmiri.

Witness Herrera and witness Ahmed Tmiri were co-defendants, alleged accomplices, who had admitted guilt and pled guilty.

Courts recognize how such evidence is very prejudicial and could affect how a jury would consider defendant's testimony as they hear it. Hence, common sense and good legal reasoning requires such instruction be given at the time the prejudicial evidence is first admitted. See People v. Denny, 241 Ill.App.3d 345, 608 N.E.2d 1313. In Illinois, the Committee Comments to State Instruction IPI 3.14 reads:

> "At the time the evidence which is the subject of this instruction is first presented to the jury, the Committee recommends that an oral instruction should be given to explain to the jury the limited purpose of this evidence, unless the defendant objects to that instruction.
>
> If this instruction is given just before the jury is to hear the evidence in question, paragraphs [1] and [2] should be modified to

begin 'Evidence will be received ... ' and 'This evidence will be received .... '

In *People v. Denny,* 241 Ill.App.3d 345, 360-61, 608 N.E.2d 1313, 1324, 181 Ill.Dec. 839, 850 (4th Dist. 1993), the court wrote the following:

> 'Because of the significant prejudice to a defendant's case that the admission of other crimes evidence usually risks, we hold that trial courts should not only instruct the jury in accordance with IPI Criminal 2d No. 3.14 at the close of the case, but also orally from the bench (unless defendant objects) at the time the evidence is first presented to the jury.'"

As to each, a final instruction was given that advised the jury of the special limitation on Herrera and Tmiri's credibility. But no such instruction was given at the time of their testimony. Not providing such instruction at the time the witness testified is prejudicial. It permits the jury to be prejudiced until the end of the trial. This causes the jury to be without necessary guidance when guidance is necessary. This denies due process.

6.

Defendant was denied his constitutional right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and due process under the Fifth Amendment to the United States Constitution where defense counsel in opening statement advised the jury that the government's case was so weak that the defense was not even requiring the government to prove defendant guilty beyond a reasonable doubt and that defense counsel will prove defendant innocent.

Fundamental to the United States justice system is the government's requirement to prove defendant guilty beyond a reasonable doubt. In re Winship, 397 U.S. 358, 25 L.Ed.2d 368 (1970). The failure to properly so advise the jury violates due process. Taylor v. Kentucky, 436 U.S. 478, 56 L.Ed.2d 468 (1978).

Here, defense lawyer disparaged this right of defendant. He argued to the jury:

> "Members of the jury, Mr. Hyman and I, Larry and I, intend to prove to you -- that's right, we who have no burden, it's true. As you heard my adversary say, Ms. Noller and his Honor will tell you again, instruct you later, that the government, that the government has the burden of proof beyond a reasonable doubt

in every criminal case. But in this case, members of the jury, I will respectfully tell you now that we appreciate those advantages,...

And what the government, you will learn or I will prove to you, has given these people is a very, very generous plea bargain, literally shaving decades off a severe Draconian sentence that they can receive for being part of a drug conspiracy....

I'm going to prove to you that Armando Navar meddled in a relationship between Herrera and Armando Navar's sister-in-law, because he at some point, many times, told his sister-in-law that Herrera wasn't good enough for her." (Tr. 16-18)

"I will competently prove -- we will competently prove to you that Armando Navar is not a drug dealer, that the indictment is a false accusation, that Armando Navar is a hard working taxpaying individual who minds his own business, and when the police or the DEA came to his home, raided his home and arrested him, he was stunned....

Armando Navar, I will prove to you, is a hard working man who is being falsely accused by a person who has a powerful, powerful motive to testify against him, two powerful

> motives, one revenge, the other escaping the hangman's noose." (Tr. 20)

Essentially this told the jury that in this case the government need not prove defendant guilty by a reasonable doubt, but the defendant will prove his innocence. This was ineffective assistance of counsel. This prejudiced defendant because the jury was misadvised as to the government's burden before defendant testified. Crotts v. Smith, 73 F.3d 861 (9th Cir. 1995).

An assertion by a prosecutor during argument (usually during final argument) similar to defense argument here would so distort the burden of proof as to require a reversal. United States v. Vargas, 583 F.2d 380 (7th Cir. 1978). See also United States v. Segna, 555 F.2d 226 (9th Cir. 1977). In Segna, the court in reversing stated:

> "In his closing argument to the jury, the prosecutor made erroneous and misleading statements of the law. The effect of those statements was to shift the burden of proof from the government to Segna and to deprive Segna of the benefits of the reasonable doubt standard. [Footnote omitted] Although no objection was interposed, the argument amounts to plain error and requires reversal."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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